Supreme Court, U.S.
FILED

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No. 971934 MAY 21 1998

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In The Supreme Court of the United States

October Term, 1997

ROBERT H. BRIENT, JR.
Petitioner,

v.

PETRO PSC, LP, a Delaware Limited Partnership,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

with Appendix

*David C. Lee
LEE, LEE, & LEE
422 Gay Street
Knoxville, TN 37902

(423) 544-0101

Attorneys for Petitioner
**Counsel of Record*

May 19, 1998

LEGAL ADVANTAGE * 432 Walnut Street * Cincinnati, OH 45202
(800) 581-2252

102 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals decided incorrectly as a matter of law that Tennessee's "Open and Obvious" Doctrine is a complete bar to a plaintiff's recovery, considering that the Tennessee Supreme Court decided shortly thereafter that a danger that is "open and obvious" does not, ipso facto, relieve the defendant of a duty of care?

PARTIES TO THE PROCEEDING

The petitioner is Robert Brient, an individual.

The respondent, Petro PSC, LP, is a Delaware limited partnership.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1997

ROBERT H. BRIENT, JR.
Petitioner,

v.

PETRO PSC, LP,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Robert Brient respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. In the alternative, petitioner asks that this case be remanded for review consistent with the recent Tennessee Supreme Court decision in Coln v. City of Savannah (APP. B).

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, review of which is sought, is unreported and is reproduced in the Appendix attached to this Petition as App. A.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on January 20, 1998. Petitioner's timely filed petition for rehearing and rehearing en banc was denied on or about March 2, 1998. A subsequent petition for rehearing was filed along with the decision of Coln v. City of Savannah.

STATUTORY PROVISIONS INVOLVED

No statutory provisions are applicable.

STATEMENT OF THE CASE

A. Facts

Petitioner Robert Brient fell off a retaining wall at the edge of a parking lot at the defendant's truck stop. There was no railing to prevent persons like petitioner from falling. Petitioner received massive injuries including a shattered femur. At trial, petitioner called architect and engineer Dr. Stanley Rabun who testified that the lack of a railing violated local building codes which were in existence at the time the premises were constructed. (App. C.) Dr. Rabun testified as follows:

Q. Have you an opinion as to whether or not the parking lot at Petro violates any ordinances of Knox County in any regard?

A. Yes, it does.

On redirect examination Dr. Rabun was asked:

Q. Dr. Rabun, is it foreseeable that people will fall at a place that has more than a 30 inch or 36 inch vertical drop in which there is not a 42 inch pedestrian guardrail?

MR HILL: Object. That is outside the field of this man's expertise.

THE COURT: Overruled. You may ask him.

A. Yes, it's not only foreseeable. It's predictable that at some point in time someone will fall.

Even the defendant's expert, Mike Waller, testified that he believed the lack of a railing was a hazard, although he disputed that it violated ordinances. (APP D.)

B. District Court Proceedings

The jury verdict before fault was apportioned was $25,000. The jury also determined that appellant was 47% at fault and that appellee was 53% at fault. The court

entered judgment for plaintiff in the amount of $13,250.00. After trial, plaintiff asked the court for additur and/or a new trial, both of which were denied. A timely notice of appeal was filed. The petitioner did not contest the apportionment of fault.

C. Court of Appeals

Brient appealed the denial of a trial and/or additur on the basis that the verdict was lower than the stipulated medical damages alone. Petro cross-appealed on the basis that the trial court incorrectly denied Petro's motion for summary judgment, motion for a directed verdict, and motion notwithstanding the verdict under Tennessee's "open and obvious" doctrine. The Court of Appeals did not consider Brient's appeals because it held that as a matter of law Mr. Brient was not entitled to a jury trial under Tennessee's "open and obvious" doctrine. The Court of Appeals wrote "we believe it is clear that a plaintiff is barred from recovery in negligence when his injuries are caused by a hazard that is "open and obvious", and even more clearly so when the hazard is actually known by the plaintiff." (Page five, APP. A) The parties had vigorously disputed whether by local code a guardrail was required. The court wrote "it would be inappropriate for us to attempt to resolve the dispute as to the applicability of the building code and its guardrail provisions. Happily, we find it

unnecessary to do so." (page 8, APP. A) "The logic of Eaton and its progeny is that there is no duty, and therefore no cause of action for negligence, when the hazard in question is open and obvious. This is so regardless of how "negligent" the defendant's conduct ordinarily would appear to be." (page 9, APP. A)

Brient timely filed for rehearing and rehearing en banc, both of which were denied on or about March 2, 1998. These filings showed that Tennessee law would recognize a duty owed by the defendant in this case.

Petitioner filed a second motion to reconsider and to suspend the rules regarding deadlines in light of Coln decision.

REASONS FOR GRANTING THE WRIT

Certiorari is appropriate in this case under Sup.Ct.Rule 10.1(a). The Sixth Circuit has entered a decision in conflict with a decision of a state Supreme Court on an important issue. In particular, the Sixth Circuit has decided as a matter of law that an individual injured as a proximate cause of another's negligence has no cause of action because there is no duty when the hazard is open and obvious, regardless of how "negligent" the defendant's conduct ordinarily would appear to be.

This Sixth Circuit decision squarely conflicts with the Tennessee Supreme Court decision in Coln (APP. B) which wrote:

> "We also agree that attempting to analyze the duty issue simply by labeling some conditions "open and obvious," without consideration of any surrounding circumstances, promotes arbitrary and inconsistent results. Moreover, the open and obvious rule is inconsistent with our cases which analyze duty by balancing foreseeability and gravity of harm with feasibility and availability of alternatives that would have avoided the harm."

Tennessee thereby joined those jurisdictions that have limited the "open and obvious" doctrine in favor of the Restatement approach. The Tennessee Supreme Court held that a danger that was "open and obvious" does not, ipso facto, relieve the defendant of a duty of care.

CONCLUSION

For the reasons set forth herein, the court's standards for granting certiorari, as set forth in Sup.Ct.Rule 10(a), are well met in this case. Consequently, the petitioner respectfully submits that the petition should be granted, or

that this case be remanded to the Sixth Circuit consistent with the recent Tennessee Supreme Court case Coln v. City of Savannah (APP. B).

Respectfully submitted,

David C. Lee

David C. Lee, TN Bar # 015217
Lawyer for Plaintiff/Appellant

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6TH CIRCUIT FILINGS:

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Excerpts from Trial Testimony of
Miachael Waller,
Defendant's Expert . . . . . D-1 thru D-3

Order Denying of Rehearing and
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nº. 96-6405
Filed January 20, 1998

Pages A-1 thru A-13

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
Nos. 96-6405; 96-6494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT H. BRIENT, JR.,	)
	)
Appellant/Cross-Appellee,	)
	)On Appeal from
v.	)the United States
	)District Court for
	)the for the Eastern
	)District of Tennessee
PETRO PSC, L.P.,	)
a Delaware Limited Partnership,	)
	)
Appellee / Cross-Appellant.	)
_____	)

Before: BOGGS, MOORE, and FARRIS,* Circuit Judges.

*The Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM. This is a negligence action in which plaintiff Robert H. Brient, Jr., alleges that defendant Petro PSC, L.P. ("Petro"), is liable under Tennessee law for the injuries Brient sustained when he fell over a low retaining wall on Petro's property in Knox County, Tennessee. In No. 96-6405, Brient appeals certain evidentiary rulings as well as the sufficiency of a jury verdict awarding him 53 percent of $25,000 in total compensatory damages. In No. 96-6494, Petro cross-appeals the district court's decision denying Petro's motion for judgment as a matter of law. We reverse in that case and hold that Petro was entitled to judgment as a matter of law. We thus find it unnecessary to consider the issues raised in Brient's appeal.

I

In November 1994, Brient was driving from his home in Texas to Asheville, North Carolina, on a business trip. Brient stopped for the night at a truck stop owned and operated by Petro in Knox County, Tennessee. Brient planned to eat at Petro's Iron Skillet restaurant and then spend the night in the covered bed of his pickup truck. Brient ate dinner at the Iron Skillet as planned. He then parked his truck in Petro's parking lot, which he described at trial as "a big area that is well lighted." Petro's parking lot consists of two levels, and Brient parked on the upper level. The upper level was separated from the lower level by a retaining wall. Brient testified

at trial that, at around midnight, he backed his pickup truck into a parking space so that the tailgate was three to five feet away from the retaining wall. Brient testified that he was aware of the retaining wall. He also testified that he was aware that the wall separated the upper level from the lower level, and that many vehicles were parked on the lower level. In particular, Brient testified that he "remember[ed] seeing a very low wall" at the end of his parking space; "[t]hat is one of the reasons [he] parked farther away.

After he parked his truck, Brient opened the rear of the truck and arranged his bedding. He apparently meant to get into the pickup bed feet-first so that his head would be toward the rear of the truck. However, Brient testified that he never got into the truck to sleep.[1] The next thing Brient recalls after arranging his bedding in the pickup bed is waking up approximately 30 minutes later on the ground on the lower level of the parking lot. As a result of his fall, Brient suffered a broken femur, related medical expenses, and alleged damages for general pain and suffering.

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[1]Petro introduced testimony to the effect that Brient said shortly after his accident that he actually had been sleeping in the pickup bed before he fell to the first parking level. For purposes of determining whether Petro was entitled to judgment as a matter of law, however, we take the facts to be as Brient testified.

II

Brient filed suit against Petro in the United States District Court for the Eastern District of Tennessee in 1995, alleging negligence under Tennessee common law — specifically, that the retaining wall was too low. In response to pleadings filed by Petro, Brient eventually filed a second amended complaint naming both Petro, the owner of the premises where Brient's accident occurred, and Robert G. Campbell & Associates, Inc. ("Campbell"), the architecture firm that designed the parking lot. The district court eventually dismissed Campbell from the case based on the applicable Tennessee four-year statute of limitations.

Following substantial discovery, Petro also moved for summary judgment. Petro's motion was based largely on Brient's deposition testimony that the parking lot was well-lit and that he was aware of the retaining wall and the height differential between the upper and lower levels of the parking lot. Petro argued that, under several recent Tennessee state court decisions, Brient's admitted knowledge of the "open and obvious" danger posed by the low retaining wall entitled Petro to summary judgment. Petro also introduced an affidavit from the Chief Building Official for the Knox County Code Administration and Inspection Department, who stated that Petro's parking lot was inspected for compliance with applicable building codes in 1987 and that the county

issued a certificate of occupancy at that time. The district court denied Petro's summary judgment motion without opinion.

The case then proceeded to trial, at which Brient's testimony reinforced the proposition that, at the time of his accident, he was aware of his proximity to Petro's low retaining wall and of the height differential between the upper and lower levels of the parking lot. However, Brient presented the testimony of architectural expert Stanley Rabun, who opined that the retaining wall was not in conformity with the Southern Standard Building Code (apparently applicable in Knox County), which requires retaining walls in "parking structures" to be topped with guardrails so as to form a "vertical protective barrier" at least 42 inches high. At the close of Brient's proof, Petro moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 on the ground that Brient admittedly knew of the hazard posed by the retaining wall. The district court orally denied Petro' 5 motion, stating that "[i]t's. . . a jury issue." Referring to Petro's reliance on Tennessee's "open and obvious" rule, under which landowners are not liable for injuries occurring as a result of open and obvious hazards on their property, the district court stated that "[u]nfortunately the law in Tennessee has changed since we built [sic] that. We are in a situation where you compare fault."

Petro therefore proceeded to put on its case. Among other witnesses, Petro called architectural engineering expert Michael Wailer, who testified that Petro's retaining wall was not covered by the Standard Building Code's requirement that retaining walls in a 'parking structure" be topped with guardrails. Waller also testified (without a hearsay objection) that he had been informed by the Knox County Building Authority that Petro's retaining wall was not required to have a guardrail. Petro then renewed its motion for judgment as a matter of law. The district court again denied Petro's motion, and we are now called upon to determine whether this disposition was consistent with Tennessee law.

III

A

Like many states, Tennessee followed the contributory negligence doctrine until quite recently. Under the contributory negligence doctrine, a plaintiff could not recover for injuries caused by a defendant's negligence if the plaintiffs own negligence contributed to the injuries. *See, e.g., Hudson v. Gaitan*, 675 S.W.2d 699, 703-04 (Tenn. 1984). Tennessee also historically has recognized the "open and obvious" doctrine, under which a plaintiff cannot recover in negligence for injuries caused by an open and obvious hazard. *See, e.g., Norman v. Fisher Marine, Inc.*, 672 S.W.2d 414, 421

(Tenn. App. 1984). In 1992, however, the Tennessee Supreme Court abolished contributory negligence in Tennessee, replacing it with a system of modified comparative negligence in which a plaintiff may recover a percentage of his actual damages as long as his own negligence was less than 50 percent responsible for his injuries. *See McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). The question presented in this case is whether Tennessee's abolition of the contributory negligence doctrine effectively altered or abolished the "open and obvious" rule.

Notwithstanding Brient's arguments to the contrary, we believe it is clear that a plaintiff is barred from recovery in negligence when his injuries are caused by a hazard that is "open and obvious," and even more clearly so when the hazard is actually known by the plaintiff. The Tennessee Supreme Court expressly reaffirmed the post-comparative negligence vitality of the "open and obvious" rule in *Eaton v. McLain*, 891 S.W.2d 587 (Tenn. 1994), where the openness and obviousness of the hazard (a dark staircase) was held to necessitate a directed verdict in favor of the defendants, notwithstanding Tennessee's abolition of the contributory negligence defense. *See Eaton*, 891 S.W.2d at 594-95. Significantly, the court noted that the new comparative negligence regime had no effect on the applicability of the "open and obvious" rule because, as a matter of law,

the plaintiff had failed to establish a negligence claim against the defendants in the first place; the obvious character of the hazard was held to negate the duty element of the negligence cause of action.[2] *See id* at 593. The court reasoned that while the defendants had a duty "of either removing or warning against any latent dangerous condition on the premises," *id.* at 594, no such duty "arise[s] if the danger is open and obvious." *Id.* at 595.

Several panels of the Tennessee Court of Appeals have relied on Eaton in rejecting arguments that Tennessee's abolition of contributory negligence should preclude a defendant from relying on the "open and obvious" defense. For example, in *Jones v. Exxon Corp.*, 940 S.W.2d 69 (Tenn. App. 1996), the appellate court affirmed a trial court's order granting summary judgment against the plaintiff's negligence claim against a gas station. The plaintiff argued that, while she was aware of the presence of a puddle of gasoline near her car before she slipped on the puddle and injured herself, the owner of the gas station was not entitled to a defense based on the plaintiffs knowledge and the obviousness of the

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[2]Negligence in Tennessee law consists of the traditional five elements of duty, breach of duty, cause in fact, proximate cause, and damages. *See McCarley v. West Quality Food Serv.*, 948 S.W.2d 477, 479 (Tenn. 1997).

hazard because of Tennessee's abolition of the contributory negligence doctrine. *See Jones*, 940 S.W.2d at 70-71. Citing *Eaton*, the appellate court disagreed, stating that "[w]here there is no duty, there is no negligence." *Id.* at 72. Two other panels of the appellate court have reached the same conclusion on similar facts. *See Valentine v. Weatherford*, No. 02A0-1-9511-CV-00264 (Tenn. App. Dec. 31, 1996) (slip op.) (holding defendant not liable for injuries sustained by plaintiff when plaintiff fell over low retaining which he had previously observed); *Shope v. Radio Shack*, No. 03A01-9508-CV-00288 (Tenn. App. Dec. 7, 1995) (slip op.) (holding defendant not liable for injuries sustained by plaintiff when he tripped over display counter which he had previously observed, and stating that "if the defendant owes no duty to the plaintiff, there is no negligence to compare").[3]

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[3]Responding to these cases, Brient argues that another line of authority — and particularly *Cooperwood v. Kroger Food Stores, Inc.*, 1994 WL 725217 (Tenn. App. 1994) — supports the proposition that "obviousness of danger is not a legal bar to recovery but that it only goes to the issue of comparative fault." We find Brient's argument unpersuasive. The cases cited by Brient all predate *Eaton*, in which the Tennessee Supreme Court conclusively resolved the issue. Moreover, the *Cooperwood* decision was specifically disavowed by the court of appeals in light of the decision in *Eaton*. *See*

The undisputed facts of this case demonstrate that Petro's parking lot was brightly lit and that Brient was aware when he parked his truck that he was near a low retaining wall with a sharp drop-off to the lower parking level. Under *Eaton* and its progeny, as a matter of law Brient therefore cannot establish the duty element of negligence.

B

Brient argues that, even if the "open and obvious" rule has survived Tennessee's abolition of contributory negligence, his claim satisfies the duty element of negligence because Petro's failure to place a guardrail on top of its retaining wall constituted negligence *per se*. For this proposition, Brient relies on a provision in the Southern Standard Building Code requiring that certain walls in "automobile parking structures" be equipped with guardrails. The parties vigorously dispute whether Petro's open-air parking lot was a "parking structure" subject to the provisions of the building code. Petro introduced an affidavit from the Chief Building Official of the Knox County Code Administration and Inspection Department stating that the department issued a certificate of occupancy certifying that Petro's parking lot was in

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Jones, 940 S.W.2d at 72.

compliance with applicable codes.[4] Petro also introduced expert testimony to the effect that the parking lot was not a "parking structure" subject to the requirements of the building code. Brient rebutted this evidence with expert testimony to the effect that Petro's parking lot was a covered "parking structure," though Brient's expert conceded that reasonable experts could disagree on this point.

In reviewing the district court's decision denying a Rule 50 motion for judgment as a matter of law, it would be inappropriate for us to attempt to resolve the dispute as to the applicability of the building code and its guardrail provisions. Happily, we find it unnecessary to do so. While the Tennessee courts appear not to have addressed the precise question, courts in other states have recognized that a plaintiff may not sue for injuries caused by a known hazard, even where the creation of the hazard was negligent *per se*. *See, e.g., Maky v. Pattersons, Inc.*, No. 96-G-1962, 1996 WL 649156, at *3 (Ohio App. July 5, 1996) (holding defendant not liable for injuries caused

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[4]Though not urged by Petro, it strikes us that the Chief Building Official's interpretation of the building code might constitute an administrative interpretation of an ambiguous statute or regulation entitled to judicial deference. See Riggs v. Burson, 941 S.W.2d 44, 50 (Tenn. 1997) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984)).

by nonconforming staircase because hazard was "open and obvious"); *Rosas v. Doreen*, 402 S.W.2d 813, 814 (Tex. Civ. App. 1966) (affirming summary judgment on both negligence and negligence *per se* theories because hazard was "open and obvious").

It is reasonable to conclude that the Tennessee Supreme Court would follow these courts, particularly given that in other contexts, the Tennessee Supreme Court has held that a party with actual knowledge of a hazard and the ability to avoid the hazard is responsible for avoiding the hazard, even if the creation of the hazard was due to the other party's negligence. *See Street v. Calvert*, 541 S.W.2d 576 (Tenn. 1976) (describing last clear chance doctrine as "most frequently applied modification of the strict rule of contributory negligence"). The logic of *Eaton* and its progeny is that there is no duty, and therefore no cause of action for negligence, when the hazard in question is open and obvious. This is so regardless of how "negligent" the defendant's conduct ordinarily would appear to be. It would be quite anomalous if the "open and obvious" rule permitted a defendant to escape liability for even truly dangerous conduct as long as such conduct was not in violation of a statute, but permitted liability any time a statutory standard of care was breached. We find nothing in Tennessee law that would dictate such a strange result. We therefore conclude that even if Petro's retaining wall

did not conform to the building code — a proposition that is doubtful at best Brient's admitted knowledge of the hazard posed by Petro's retaining wall is fatal to his negligence claim.

IV

For the foregoing reasons, the judgment of the district court is VACATED and the case is REMANDED to the district court with instructions that judgment be entered in favor of Petro.

APPENDIX B

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF TENNESSEE

OPINION

Sixth Circuit Case №. 96-6405
Filed March 30, 1998

Pages B-1 thru B-40

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

HAZEL MAXINE COLN &
husband, CARL F. COLN,

Appellants,

V.

CITY OF SAVANNAH,
TENNESSEE,

Appellee.

HARDIN LAW

HON. JULIAN P.
GUINN, JUDGE

No. 02-S-01-9702-CV-
00008

and

DEBBIE VANCLEAVE,

Appellant,

V.

MATTHEW MARKOWSKI &
wife, DIANE MARKOWSKI,

Appellees.

MADISON LAW

H. WHIT LAFON,
JUDGE

No. 02-S-01-9704CV-
00026

For Appellants, Coln:
Edward L. Martindale, Jr.
DREW AND MARTINDALE
Jackson, Tennessee

For Appellant, Vancleave:
James H. Bradberry

For Appellee, City of
Savannah:
James A. Hopper
Savannah, Tennessee

For Appellees, Markowski:
Russell E. Reviere

JAMES H. BRADBERRY
& ASSOCIATES
Dresden, Tennessee

Bradford D. Box
RAINEY, KIZER,
BUTLER, REVIERE
& BELL, P.L.C.
Jackson, Tennessee

OPINION

COLN: COURT OF APPEALS REVERSED AND TRIAL COURT JUDGMENT REINSTATED.

VANCLEAVE: COURT OF APPEALS REVERSED AND CASE REMANDED TO TRIAL COURT.
ANDERSON, C.J.

We granted permission to appeal in two premises liability cases to determine a common question to both - whether and to what extent the traditional open and obvious rule eliminating a landowner's duty to one injured as a result of an open and obvious danger continues to be viable after the adoption of comparative fault in McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).[1]

In the first premises liability case, Coln v. City of Savannah, the trial judge implicitly found a landowner duty and, applying comparative fault principles, found

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[1]We have consolidated these cases pursuant to Tenn. R. App. P. 16(b), because they contain a common question of law.

that the injured plaintiff, who tripped over brick pavers installed in the sidewalk by the City, was 30 percent negligent and the City was 70 percent negligent, and awarded damages accordingly. The Court of Appeals reversed, implicitly acknowledging a duty owed by the City but finding that the plaintiff was at least 50 percent negligent because "the condition of the sidewalk was obvious to the extent that a reasonably prudent person should have recognized the potential hazard that it presented."

In the second case, Vancleave v. Markowski, the trial judge, implicitly finding no landowner duty, granted summary judgment to the landowner after finding that the opening in a pool deck on which the plaintiff fell and was injured was "clearly visible and not concealed and that anyone walking on the premises should have been able to observe it." The Court of Appeals affirmed.

After reviewing the two cases before us, the extensive literature, our Tennessee cases on the subject, and cases from other jurisdictions, we conclude that an open and obvious danger does not automatically result in a finding of no duty and therefore no landowner liability. As in any negligence action, we think a risk is unreasonable and gives rise to a duty to act with due care it the foreseeable probability and gravity of harm posed by a defendant's conduct outweigh the burden upon the defendant to engage in alternative conduct that would

prevent the harm. McCall v. Wilder, 913 S.W.2d 150 (Tenn. 1995). Applying this analysis, if the foreseeability and gravity of harm posed by the defendant's conduct, even if "open and obvious," outweigh the burden upon the defendant to engage in alternative conduct, the defendant has a duty to act with reasonable care and the comparative fault principles apply under McIntyre v. Balentine, supra.

After reviewing the record in each case and applying this rule, we reverse the Court of Appeals' judgment in Coln v. City of Savannah and reinstate the judgment of the trial court awarding damages. We also reverse the Court of Appeals' summary judgment in Vancleave v. Markowski and remand to the trial court for proceedings consistent with this opinion.

BACKGROUND

Coln v. City of Savannah

In June of 1992, the City of Savannah ("City") contracted to have decorative brick pavers installed in front of the entrance of its City Hall building. The brick pavers were installed on top of a bed of sand in an area approximately thirteen and one-half feet wide by sixteen and one-half feet long; the surface of the pavers when installed was below the level of the adjacent concrete sidewalk that led to the door of the City Hall building.

On November 2, 1992, the plaintiff, Hazel Coln, who was 68 years of age, walked across the brick pavers toward the entrance of the building and tripped on the lip of the concrete sidewalk adjacent to the brick pavers. She fell, injuring her left wrist and arm. Coln conceded that the weather had been clear and sunny, and that nothing prevented her from seeing the brick pavers or the sidewalk.[2]

William Gilchrist, the landscape designer who installed the brick pavers, testified that there was a deviation approximately three-eighths of an inch between the pavers and sidewalk when the pavers were installed. Gilchrist testified that the deviation was due to the settling of sand beneath the pavers, as well as a hump in the concrete sidewalk. When he installed the brick pavers, Gilchrist told Bill Fox, the assistant manager for the City, that a deviation existed and that half of the pavers would have to be replaced to correct the deviation.

Fox testified that he knew about the deviation between the pavers and the sidewalk, but felt that it was acceptable and should not be corrected. Paul Lebovitz, a landscape architect, testified that it is reasonable to expect some deviation between the two surfaces when pavers are

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[2]The plaintiff acknowledged that she suffered from several medical ailments, some of which resulted in occasional fainting or dizziness. She did not testify that she had such a spell on the day and time in question.

installed near a concrete sidewalk but that pavers are accepted in the industry as a safe walkway material. There was also evidence that the size of the deviation was several inches greater at the time the plaintiff was injured.

The plaintiffs alleged that the City "had negligently and carelessly left [the area of the new brick pavers] defective and in disrepair" and that the City had created "a dangerous condition for the plaintiff and any other person walking down said sidewalk." The trial court rejected the City's reliance on government immunity provisions[3] after finding that the sidewalk was defective, unsafe, and dangerous:

> [The defendant] surprisingly knew of [the deviation] in its inception, but accepted it and made no attempt to correct it .... They created and maintained the defective, unsafe and dangerous condition and ... this condition was the proximate cause of the injuries suffered or experienced by the Plaintiff wife.

Accordingly, the trial court apportioned 30 percent of the negligence to the plaintiff and 70 percent to the City.

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[3]See Tenn. Code Ann. § 29-20-201 (a)(Supp. 1997) (governmental immunity) and Tenn. Code Ann. § 29-20-203(a)(Supp. 1997)(removal of immunity for "defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway....").

On appeal, the City contended that the trial court erred in finding that the sidewalk was defective, unsafe, or dangerous, and that the trial court should have found that the plaintiff was at least 50 percent negligent because the condition of the sidewalk was "open and obvious." The Court of Appeals noted that the "open and obvious" rule traditionally removed any duty owed by a defendant to a plaintiff who is injured as a result of dangerous conditions that are open and obvious, but said that the rule was subsumed by the comparative fault system adopted in McIntyre v. Balentine, supra. Thus, the court held:

> We adhere to the concept that there is no liability on the person or entity in control of premises if a person lawfully thereon fails to exercise reasonable care for his or her own safety or for dangers that are obvious, reasonably apparent, or as well known to the injured party as to the owner, operator or person in control of the premises, so long as the plaintiff's negligence is equal to or greater than the defendant's negligence. . .. Otherwise stated, we are of the opinion that the duty of the plaintiff has not been changed but plaintiff's failure to meet her duty must be compared to the negligence of the tortfeasor....

The court then concluded that plaintiff Coln was at least 50 percent negligent under the facts of this case, and reversed the judgment.[4]

Vancleave v. Markowski

In October of 1993, the plaintiff, Debbie Vancleave, was a guest at the home of the defendants, Matthew and Diane Markowski. According to their depositions, Vancleave and Diane Markowski went into the backyard to the deck area around a swimming pool, where they walked, talked and surveyed the landscaping in the yard. Vancleave, who was walking behind Markowski, fell into an opening in the deck area that was eighteen inches wide and three feet long. The opening normally contained a skimmer used for cleaning the pool, but it had been removed for the fall and winter months. Vancleave's right knee went into the opening, and she also injured her left ankle.

The plaintiff filed suit alleging negligence, and the landowners filed a motion for summary judgment on the basis that the opening in the deck was an open and obvious condition. The trial court agreed, finding that

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[4]The Court of Appeals therefore did not address the defendant's contentions with regard to the governmental immunity provisions of the Tennessee Government Tort Liability Act.

"the plaintiff was injured on an opening in the deck which was clearly visible and not concealed and that anyone walking on the premises should have been able to observe it." The Court of Appeals affirmed the order granting summary judgment to the defendants.

SUMMARY

In each of these premises liability cases, the plaintiff contends that the open and obvious rule does not preclude finding a duty owed by the defendant landowner and that an open and obvious danger is merely a factor for consideration in determining comparative fault under McIntyre v. Balentine. The landowner defendants in both cases maintain that the rule is intact: that there is no duty of care when an open and obvious condition results in injury to the plaintiff. The City of Savannah in Coln also contends that the plaintiff was at least 50 percent negligent, barring recovery under comparative fault. The Court of Appeals' analysis in each case reflects the conflicting views about duty and comparative fault it has expressed in a series of its unpublished decisions.[5]

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[5]The Court initially indicated that the open and obvious rule was subsumed by comparative fault principles. Broyles v. City of Knoxville, No. 03A01-9505-CV-001 66 (Tenn. App., E.S., Aug. 30, 1995); Cooperwood v. Kroger Food Stores Inc., No. 02A01-9308-CV-00182 (Tenn. App., W.S., Dec. 30, 1994). Subsequent decisions indicated that the

We granted and consolidated these appeals to resolve the conflicting views and to determine the viability of the "open and obvious" rule after McIntyre; specifically, whether an "open and obvious" condition relieves a defendant's duty of care or whether it merely is considered in assessing the comparative fault of the parties.

NEGLIGENCE PRINCIPLES

A negligence claim requires proof of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993).

The initial requirement, the existence of a legal duty, is a question of law for the court which requires consideration of whether "such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of others -- or, more

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open and obvious rule was not changed by McIntyre's adoption of comparative fault. Tracy v. Exxon Corp., No. 02A01-9512-CV-00277 (Tenn. App., W.S., Dec. 31, 1996); Jones v. Exxon Corp., No. 02A01-9507-CV-00159 (Tenn. App., W.S., Aug. 27, 1996); Shope v. Radio Shack, No. 03A01-9508-CV00288 (Tenn. App., E.S., Dec. 7, 1995).

simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant." Id. at 870 (quoting, W. Page Keeton, Prosser & Keeton on the Law of Torts, § 37 at 236 (5th ed. 1984)).

In McCall v. Wilder, supra, we explained that "a risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." Among the factors for consideration are

> the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of activity engaged in by defendant; the usefulness the conduct to defendant; the feasibility of alter safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct.

913 S.W.2d at 153.

The determination of whether a duty is owed requires a balancing of the foreseeability and gravity of the potential harm against the burden imposed in

preventing that harm. McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891, 901 (Tenn. 1996). Assuming a duty of care is owed, be it a duty to refrain from creating a danger or a duty to warn against an existing danger, it must then be determined whether a defendant has conformed to the applicable standard of care, which is generally reasonable care under the circumstances. "Ordinary, or reasonable, care is to be estimated by the risk entailed through probable dangers attending to the particular situation and is to be commensurate with the risk of injury." Doe v. Linder Const. Co., Inc., 845 S.W.2d 173, 178 (Tenn. 1992).

If the plaintiff meets the burden of establishing the defendant's duty in a particular case, as well as the other elements of the negligence claim, the trier of fact must apply the principles of McIntyre v. Balentine, supra. In that case we joined nearly every jurisdiction in holding that a plaintiff's contributory negligence no longer would bar recovery against a tortfeasor and adopting a system of comparative negligence in which the plaintiff's negligence is compared to the fault of the defendant or defendants.[6]

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[6]We have since distinguished comparative negligence from comparative fault. The former is the measure of the plaintiff's negligence in percentage terms that reduces the plaintiff's recovery. The latter encompasses the determination of how to apportion damage recovery among multiple or joint tortfeasors according to the percentage of

A plaintiff whose negligence is less than that of a tortfeasor may now recover damages reduced by a percentage of the plaintiff's own negligence. 833 S.W.2d at 54.

Our holding in McIntyre was a fundamental change in negligence law in Tennessee. It was based on considerations of fairness and consistency, as well as to avoid the inconsistent and often harsh results to plaintiffs whose negligence was far less than that of a defendant or defendants. Although we have since analyzed the effect of adopting comparative fault on a number of common law negligence doctrines, see, e.g, Perez v. McConkey, 872 S.W.2d 897 (Tenn. 1994)(implied assumption of risk), we now address for the first time its effect on the traditional "open and obvious" danger doctrine.

OPEN AND OBVIOUS DOCTRINE

In premises liability cases, application of duty principles resulted in imposing a duty on an owner or possessor of premises to exercise reasonable care under the circumstances to a guest (licensee) or business

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fault attributable to each. Owens v. Truckstops of America, 915 S.W.2d 420, 425 n. 7 (Tenn. 1996).

invitee.[7] The duty includes the responsibility of either removing or warning against any latent or hidden dangerous condition on the premises of which one was aware or should have been aware through the exercise of reasonable diligence. Eaton v. McLain, 891 S.W.2d 587, 594 (Tenn. 1994); Smith v. Inman Realty Co., 846 S.W.2d 819, 823 (Tenn. App. 1992).

Because the rationale for the imposition of this duty was partly the "owner's superior knowledge of a perilous condition on his premises," a rule of no-liability also was derived: that a premises owner has no liability for injuries sustained from dangers that were "obvious, reasonably apparent, or as well known to the invitee [or licensee] as to the owner." Kendall Oil Co. v. Payne, 293 S.W.2d 40, 42 (Tenn. App. 1955); see also McCormick v. Waters, 594 S.W.2d 385, 387 (Tenn. 1980). In many jurisdictions, this so-called "open and obvious" rule was frequently explained in terms of duty, that is, a defendant has no duty to warn or protect against a known or obvious danger. Other jurisdictions analogized the open and obvious rule to contributory negligence or assumption of risk, doctrines that also barred a plaintiff's recovery for negligence. See Keeton,

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[7]At one time, there was a distinction in the duty owed to a licensee as opposed to an invitee. This distinction has since been abolished. Hudson v. Gaitan, 675 S.W.2d 699 (Tenn. 1984).

Personal Injuries Resulting From Open and Obvious Conditions, 100 U. Pa. L. Rev. 629 (1952). Regardless of the terminology, the result was the same: no recovery.

Despite its traditional application by many courts, the open and obvious doctrine was widely criticized for producing arbitrary results and being "wrong in policy." James, Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees, 63 Yale L.J. 605, 628 (1954). As one commentator said:

> [T]here is perhaps no condition the danger of which is so obvious that all [persons] under all circumstances would necessarily see and realize the danger in the absence of contributory negligence, and this is particularly true if the further principle so often repeated is accepted that the customer or business invitee is entitled to assume that the premises are reasonably safe for his use.

Keeton, supra, 100 U. Pa. L. Rev. at 642. Another writer observed that the open and obvious rule failed to consider all the relevant circumstances:

> An undeniable legal error is committed every time a court bars recovery to an injured person based solely on the fact that the perilous nature of the alleged cause of

> harm was 'apparent to all,' without any consideration of the multitude of other factors which may justify or excuse the plaintiff's conduct.

Phillips, Assumption of the Risk Returns in Disguise as the Open and Obvious Doctrine Defense, 30 ISBA Tort Trends 4 at 10 (1995).

In addition to these criticisms, the adoption of comparative fault principles led numerous jurisdictions to reconsider the open and obvious rule and to conclude that it should not automatically preclude recovery.[8] As the Mississippi Supreme Court observed:

> Emerging from other jurisdictions is a modern trend toward holding that the obviousness of a danger does not necessarily relieve the owner's duty of care. Moreover, many states have limited the use of this doctrine by holding that a

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[8]See Regency Lake Apartments Association, Ltd. v. French, 590 So.2d 970 (Fla. App. 1991); Harrison v. Taylor, 768 P.2d 1321 (Idaho 1989); Ward v. K Mart Corp., 554 N.E.2d 223 (111. 1990); Konicek v. Loomis Brothers, Inc., 457 N.W.2d 614 (Iowa 1990); Bertrand v. Alan Ford, Inc., 537 N.W.2d 185 (Mich. 1995); Tharp v. Bunge Corp., 641 So.2d 20 (Miss. 1994); Parker v. Highland Park, Inc., 565 S.W.2d 512 (Tex. 1978); Laesch v. L & H Ind., Ltd., 469 N.W.2d 655 (Wis. Ct. App. 1991).

> plaintiff's knowledge or the obviousness of a dangerous condition does not preclude recovery, and, some instances, states have expressly abolished the open and obvious doctrine after the adoption of comparative negligence.

Tharp v. Bunae Corp., 641 So.2d at 24. The Illinois Supreme Court agrees that "[t]he manifest trend of the courts in this country is away from the traditional rule absolving, ipso facto, owners and occupiers of land from liability for injuries resulting from known or obvious conditions...." Ward v. K Mart Corp., 554 N.E.2d at 231.

Nearly every jurisdiction has also relied upon the Restatement (Second) of Torts, § 343A, which states the rule as follows:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(Emphasis added). The word "'known' denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves," and the word "'obvious' means that both the condition and the risk are apparent to and would be recognized by a

reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Restatement (Second) of Torts, § 343A (comment b). The restatement further provides that the premises owner's duty exists if the harm can or should be anticipated notwithstanding the known or obvious danger:

> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

Restatement (Second) of Torts, § 343A (comment f). As the Michigan Supreme Court has said: "if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the [defendant] is required to undertake reasonable precautions [and] the

issue then ... is for the jury to decide." Bertrand v. Alan Ford, Inc., 537 N.W.2d at 187.

Although a few courts have held that comparative fault principles abrogate the open and obvious rule entirely,[9] the majority follow the Restatement position and recognize that duty remains a necessary part of the analysis. In Ward v. K Mart, supra, for example, the Illinois Supreme Court explained:

> [W]e recognize that the Restatement speaks to the more general question of liability, and not specifically to the existence of a duty. But we think the principles expressed there are consistent with the general duty of reasonable care owed to invitees and licensees and they are relevant to the resolution of whether an injury was reasonably foreseeable. We emphasize, however, that since the existence of a duty turns in large part on public policy considerations, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden upon the defendant, as well as the likelihood of injury and the possible serious nature of

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[9]See, e.g., Harrison v. Taylor, 768 P.2d at 1321; Tharp v. Bunge Corp., 641 So.2d at 25.

such an injury must also be taken into account.

554 N.E.2d at 232 (emphasis added). The analysis, therefore, as in any negligence case, is first upon duty in accordance with the foreseeability and gravity of harm, and the feasibility and availability of alternatives; if a duty is imposed, then the surrounding circumstances are analyzed under the principles of comparative fault.[10]

TENNESSEE LAW

We agree with the rationale of the majority of courts which have limited or restricted the traditional "open and obvious" rule in favor of the Restatement approach. We also agree that attempting to analyze the

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[10]See Regency Lake Apartments Association Ltd. v. French, 590 So.2d at 973 (comparative negligence applied where plaintiff tripped over exposed tree roots within apartment complex); Ward v. K Mart Corp., 554 N.E.2d at 231 (court applied comparative negligence where plaintiff walked into concrete column while carrying large object from defendant's store); Konicek v. Loomis Brothers, Inc., 457 N.W.2d at 618 (comparative negligence where plaintiff's injury resulted from open and obvious hole in roof); Parker v. Highland Park, Inc., 565 S.W.2d at 517 (court employed comparative negligence where plaintiff injured failing on dark stairway); Laesch v. L & H Industries, Ltd., 469 N.W.2d at 659 (open and obvious defense rejected under restatement approach); cf. Buechelers v. Chicago Park Dist., 665 N.E.2d 826 (111. 1996)(no duty to warn against diving into open waters).

duty issue simply by labeling some conditions "open and obvious," without consideration of any surrounding circumstances, promotes arbitrary and inconsistent results. Moreover, the open and obvious rule is inconsistent with our cases which analyze, duty by balancing foreseeability and gravity of harm with feasibility and availability of alternatives that would have avoided the harm.

We deem the Restatement approach to be the better reasoned and more persuasive analysis. The principles stated in the Restatement (Second) of Torts, § 343(A) relate directly to foreseeability and facilitate consideration of the duty issue. Whether the danger was known and appreciated by the plaintiff, whether the risk was obvious to a person exercising reasonable perception, intelligence, and judgment, and whether there was some other reason for the defendant to foresee the harm, are all relevant considerations that provide more balance and insight to the analysis than merely labeling a particular risk "open and obvious." In sum, the analysis recognizes that a risk of harm may be foreseeable and unreasonable, thereby imposing a duty on a defendant, despite its potentially open and obvious nature.

Accordingly, while we restrict the once broad application of the "open and obvious" doctrine, we stress that duty remains a separate component of a plaintiff's negligence action. As we said in Blair v. Campbell, 924

S.W.2d 75 (Tenn. 1996), "our adoption of the principles of comparative fault did not alter the analysis applicable to the common law concept of duty ... and it is beyond dispute that duty is a question of law for the trial court's determination." Thus, only after a duty is established does comparative fault come into play.

We believe our analysis is consistent with other post-McIntyre cases. In Perez v. McConkey, supra, we addressed the effect of comparative fault on the assumption of risk doctrine which, like contributory negligence, had traditionally barred a plaintiff's recovery. After discussing the several distinct types of assumed risks, e.g., express or implied, we held that a plaintiff's primary implied assumption of risk, in which a plaintiff assumes a known risk that is inherent in a particular activity, such as watching a baseball game from an unscreened seat, should continue to be analyzed in terms of duty. Conversely, secondary implied assumption of risk, in which a plaintiff unreasonably or reasonably confronts a known risk, should be considered under comparative negligence principles:

> [T]he reasonableness of a party's conduct in confronting a risk should be determined under the principles of comparative fault. Attention should be focused on whether a reasonably prudent person in the exercise of due care knew of the risk, or should

> have known of it, and thereafter confronted the risk; and whether such a person would have behaved in the manner in which the plaintiff acted in light of all the surrounding circumstances, including the confronted risk.

872 S.W.2d at 905.

We also think our analysis is consistent with Eaton v. McLain, supra. There, a guest in the defendants' home awoke during the night and fell while trying to descend a stairway in the dark. The jury allocated 40 percent of the negligence to the guest and 60 percent to the homeowners. Although we cited the traditional rule that the defendant has no duty to warn against a danger that is open and obvious, we did so in the context of the specific facts of that case. Our analysis of the duty issue under the facts of the case was consistent with the above principles:

> As indicated in [Doe v. Linder, supra,] the question of whether the (defendants') general duty of care encompasses the duty to guard against the acts set forth in the complaint involves an analysis of the foreseeability of the risk to which [the plaintiff] was exposed. In other words, the issue is whether [the plaintiff] has made 'any showing from which it can be said

> that the *defendants reasonably knew or should have known of the probability of an occurrence such as the one which caused [her] injuries.'* Id.

Eaton, 891 S.W.2d at 594 (italics in original). Although we concluded that, under the specific facts of the Eaton case, no duty should be imposed, our holding recognized that the result could easily have been different and a duty could have been imposed:

> In order for the [defendants] to be charged with the duty to leave on the light in the hall and to lock the basement door, they must have been able to reasonably foresee that [the plaintiff] would get out of bed in total darkness, walk across the hall, and step into the basement stairwell, all without turning on any lighting whatsoever. While our holding would likely be different if no lighting had been provided or if it had been inoperative, [the plaintiff's] failure to turn on any lights, coupled with her willingness to open the door and step into an unfamiliar area is such a radical departure from reasonable conduct under the circumstances that the [defendants]

could not have reasonably foreseen that conduct and its consequences.

Id. at 594. Accordingly, although we cited the "open and obvious" rule, we did not label the dark stairwell an open and obvious danger and then hold that no duty should be imposed; instead, the duty question was analyzed with respect to the traditional components of foreseeability and risk of harm as applied to the facts of the case. Id. at 594.

To summarize, we join those jurisdictions that have limited the open and obvious doctrine in favor of the Restatement approach. That a danger to the plaintiff was "open or obvious" does not, ipso facto, relieve a defendant of a duty of care. Instead, the duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm. The factors provided in the Restatement (Second) of Torts, § 343(A) relate directly to the foreseeability question, in short, if the foreseeability and gravity of harm posed from a defendant's conduct, even if "open and obvious," outweighed the burden on the defendant to engage in alternative conduct to avoid the harm, there is a duty to act with reasonable care. The circumstances of the case are then analyzed under comparative fault.

We reject the defendants' contentions that restriction of the open and obvious danger rule will

preclude the trial court from applying mechanisms such as summary judgment and directed verdict to evaluate cases. By retaining the separate analysis of duty, and not totally subsuming all cases by applying comparative fault, the mechanisms of summary judgment and directed verdict remain viable to evaluate cases at preliminary stages in the proceedings. A summary judgment remains appropriate, for example, where the plaintiff has not produced sufficient evidence to meet the "duty" component, or any other component of a negligence claim, as a matter of law. Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993). A directed verdict, on the other hand, remains appropriate if the court evaluates the evidence in a light most favorable to the plaintiff and determines that reasonable minds could not differ in finding that the fault of the plaintiff was equal to or greater than the fault of the defendant. Eaton, 891 S.W.2d at 590.

APPLICATION

Coln v. City of Savannah

Although the trial court did not apply a separate analysis of the duty requirement, it implicitly found that the defendant, City of Savannah, owed a duty of reasonable care to the plaintiff, and it applied comparative fault principles in assessing 70 percent of the negligence to the City and 30 percent of the negligence to the plaintiff. In reversing the judgment, the Court of Appeals

also applied comparative fault analysis, but found that the plaintiff was at least 50 percent negligent, barring recovery.

Our review of the trial court's determination of duty, a question of law, is de novo. Our review of the trial court's findings of fact, on the other hand, is "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d).

We find that the City owed a duty of care under the facts of this case. The deviation between the surface of the brick pavers and concrete sidewalk created a foreseeable probability of harm. Although the deviation was open and noticeable to a degree, it is significant that the deviation was in an area that had to be navigated in order to gain access to the City Hall building. It is also significant that the City had actual knowledge of the deviation when the pavers were installed and was aware of the availability of corrective action.[11] Despite such knowledge and the foreseeable risk of harm to persons

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[11]We believe these facts distinguish this case from the pre-McIntyre cases cited by the defendant for the proposition that a city or municipality has no duty or liability to ensure against injuries from cracks or imperfections in sidewalks. See, e.g., City of Knoxville v. Hood, 97 S.W.2d 446 (Tenn. App. 1936).

who entered the City Hall building, the City took no steps to remove or warn against the danger. In our view, the risk of harm was unreasonable despite its open and obvious nature and the foreseeability and gravity of harm, therefore, outweighed the burden imposed in protecting against that harm. See McCall v. Wilder, 913 S.W.2d at 153.

Having found a duty existed under the facts of this case, we think that the trial court correctly analyzed the conduct of the plaintiff and City under comparative fault principles. In Eaton we said that relevant factors for consideration include but are not limited to: (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as to save another's life; and (6) the party's particular capacities, such as age, maturity, training, education, and so forth. 891 S.W.2d at 892.

A trial court acting as trier of fact "has considerable latitude in allocating percentages of fault to

negligent parties... [and] appellate courts may alter these findings if they are clearly erroneous." Wright v. City of Knoxville, 898 S.W.2d 177, 181 (Tenn. 1995). After evaluating the evidence, the trial court assessed the negligence as 30 percent to the plaintiff and 70 percent to the City. In our view, given the evidence in the record, and the presumption of correctness afforded, the trial court's findings were not clearly erroneous. The Court of Appeals therefore erred in reversing the judgment.

Although not addressed by the Court of Appeals, the City maintains its reliance on immunity under the Governmental Tort Liability Act:

> Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.

Tenn. Code Ann. § 29-20-201 (a)(Supp. 1997). As noted by the trial court, such immunity may be removed under certain circumstances, including "any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and operated by such governmental entity." Tenn. Code Ann. § 29-20-203(a) (Supp. 1997). Removal of immunity under this section,

however, requires that "constructive and/or actual notice to the governmental entity of such condition be alleged and proved..." Tenn. Code Ann. § 29-20-203(b)(Supp. 1997).

The question of whether a particular site is defective, unsafe, or dangerous for the purpose of removing governmental immunity is a question of fact. Helton v. Knox County, Tennessee, 922 S.W.2d 877 (Tenn. 1996). The trial court found:

> The threshold issue in this case is the question of notice or the absence of notice and this Court finds that the Defendant City through its relationship with William Gilchrist created a defective, unsafe and dangerous condition. They surprisingly knew of it in its inception, but accepted it and made no attempt to correct it.... [T]he City then allowed this condition to exist in an ever worsening position or condition as it settled for a period of at least three months depending upon the precise date when this portion of the project was completed and perhaps a period of as much as four months or in excess of four months. That is sufficient to avoid that notice that's required under Tenn. Code Ann. 29-20-203[b]. They created and

> maintained the defective, unsafe and dangerous condition and [] this condition was the proximate cause of the injuries suffered....

The evidence in this record, reviewed with the presumption of correctness, supports the trial court's finding that the sidewalk was defective, unsafe or dangerous, as well as the finding that the City had actual notice of the condition. Tenn. R. App. P. 13(d). Moreover, because we have held that comparative fault applies to conduct that is broader than negligence, such as strict liability in tort, see, e.g., Whitehead v. Toyota Motor Corp., 897 S.W.2d 684 (Tenn. 1995), we observe that the trial court's application of comparative fault principles under Tenn. Code Ann. § 29-20-203 was entirely consistent with McIntyre v. Balentine, supra. See Bradford v. City of Clarksville, 885 S.W.2d 78 (Tenn. App. 1994).

Vancleave v. Markowski

Although neither the trial court nor the Court of Appeals indicated that it was considering the "duty" element, each implicitly found no duty when it found that the opening in the homeowners' swimming pool deck was open and obvious and granted summary judgment to the homeowners as a matter of law.

Summary judgment is appropriate only if the moving party shows that no genuine and material factual issue exists and he or she is entitled to relief as a matter of law. In ruling on such a motion, the court must consider the evidence in a light most favorable to the non-moving party and must allow all reasonable inferences in his or her favor. A summary judgment may be appropriate, therefore, "when there is no dispute over the evidence establishing the facts that control the application of a rule of law." Byrd v. Hall, 847 S.W.2d at 214-215; Tenn. R. Civ. P. 56.

Although summary judgment is a proper mechanism with which to evaluate the "duty" component of a negligence claim, we conclude that the lower courts erred in their rulings in this case. When reviewed with the applicable standards, the evidence shows that the homeowners removed the skimmer from their pool deck thereby creating a large and dangerous opening in the deck which they did not elect to otherwise cover. The homeowner invited the plaintiff onto the deck, where they walked in close proximity while talking and looking into the yard. Although the plaintiff had not previously visited the homeowners, she was not warned about the opening in the deck. There was a factual issue as to the proximity and exact distance between the plaintiff and homeowner, their actions just before the plaintiff fell into

the opening, and the existence of conduct that may have distracted the plaintiff.

In our view, the plaintiff presented sufficient evidence on the issue of whether the risk of harm was unreasonable despite its open and obvious nature and whether the foreseeability and gravity of the harm outweighed the burden imposed in protection against that harm to establish a duty on the part of the homeowner. Accordingly, the lower courts erred in granting summary judgment to the homeowners. While we express no view on the relative fault of the parties, the plaintiff was entitled to proceed with her case.

CONCLUSION

We conclude that an open and obvious danger that causes an injury to a plaintiff does not automatically result in a finding of no duty and no landowner liability. As in any negligence action, a risk is unreasonable and gives rise to a duty if the foreseeability and gravity of harm posed by a defendant's conduct, even if open and obvious, outweigh the burden upon the defendant to engage in conduct that would have prevented the harm.

Applying this rule, we reverse the judgment of the Court of Appeals in Coln v. City of Savannah, and reinstate the judgment of the trial court. We also reverse the judgment of the Court of Appeals in Vancleave v. Markowski and remand the case to the trial court for

further proceedings consistent with this opinion. Costs of the appeals in each case shall be paid by the defendants.

RILEY ANDERSON, CHIEF JUSTICE

CONCUR:

Drowota, Reid and Birch, JJ.

Holder, J. - see separate concurring opinion

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

HAZEL MAXINE COLN &
husband, CARL F. COLN,

Appellants,

V.

CITY OF SAVANNAH,
TENNESSEE,

Appellee.

and

DEBBIE VANCLEAVE,

Appellant,

V.

MATTHEW MARKOWSKI &
wife, DIANE MARKOWSKI,

Appellees.

HARDIN LAW–

HON. JULIAN P.
GUINN, JUDGE

No. 02-S-01-9702-CV-
00008

MADISON LAW

H. WHIT LAFON,
JUDGE

No. 02-S-01-9704CV-
00026

CONCURRING OPINION

Although I concur in the results, I write separately because of my disagreement with this Court's expansive use of the term "duty." This Court has properly, in my opinion, used a duty analysis to determine that class of people to whom reasonable care must be exercised. See, e.g., Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993). In my opinion, however, this Court has also improperly used a duty analysis to determine whether a party has failed to use reasonable care. See, e.g., Eaton v. McLain, 891 S.W.2d 587 (Tenn. 1994).

One commentator has stated that the question of whether there is a duty has most often seemed helpful in cases where the only real issue is whether the defendant stands "in any such relation to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit." W. Page Keeton, Prosser & Keeton on the Law of Torts, § 42 at 274 (5th ed. 1984). In courts that use "duty" to limit legal redress where causation is clear and direct, the ordinary usage of "duty:"

> has been to confine the word "duty" to questions of the existence of some relation between the defendant and the plaintiff which gives rise to the obligation of conduct in the first instance, and to deal with the connection between that obligation, once it has arisen, and the consequences which have

followed in the language of "proximate cause."

Id. at 275.

This Court, however, has followed the lead of jurisdictions that have expanded the use of a duty analysis in premises liability cases. The majority states:

> The analysis, therefore, as in any negligence case, is first upon duty in accordance with the foreseeability and gravity of harm, and the feasibility and availability of alternatives; if a duty is imposed, then the surrounding circumstances are analyzed under the principles of comparative fault.

I have no quarrel with an examination of foreseeability and the gravity of harm to determine whether a duty exists. Where I begin to differ with the majority is in the examination of the following factors as part of the analysis of duty: whether the danger was known and appreciated by the plaintiff, whether the risk was obvious to a person exercising reasonable perception, intelligence, and judgment; and whether there was some other reason for the defendant to foresee the harm. These factors are more properly considered by the trier of fact in determining whether a duty has been breached.

The existence of a duty should not be confused with a breach of that duty. See Shaw v. Petersen, 821 P.2d 220, 222 (Ariz. App. 1991) (holding that whether a hazard is

open and obvious is not relevant to determine the existence of duty, rather it is relevant to determining if the duty was breached). I would permit a jury to decide if a risk is unreasonable. Klopp v. Wackenhut Corp., 824 P.2d 293, 298 (N.M. 1992) (holding that it is for the jury to decide in virtually every case whether a dangerous condition on the premises involved an unreasonable risk of danger and whether the occupier should reasonably anticipate that the visitor will not discover or realize the "obvious" danger).

Unlike the majority of this Court, I would find that the doctrine of "open and obvious" has been subsumed into the comparative fault scheme. Once a duty is found to exist as to the class of persons to which the plaintiff belongs, the obviousness of the danger and the plaintiffs confrontation of that danger would be but two additional factors for the jury to consider in determining the parties' percentages of fault. Only if reasonable minds could not differ should a motion for summary judgment or directed verdict be granted. See Hertelendy v. Agway Ins. Co., 501 N.W.2d 903, 908 (Wis. App. 1993) (holding that the application of open and obvious danger doctrine amounts to a determination that the plaintiffs negligence in confronting an open and obvious danger exceeds the defendant's negligence as a matter of law).

Approaching the open and obvious rule by analyzing the reasonableness of a party's actions is consistent with the history of the open and obvious rule in Tennessee. In the

early history of "open and obvious," precluding recovery required analyzing the reasonableness of the actions of the plaintiff in confronting a risk or danger. The earlier cases focused on the plaintiff's prior knowledge of the danger. See Baker v. Louisville & N. Terminal Co., 106 Tenn. 490, 61 S.W. 1029, 1031 (1901) ("This was a danger that was open and obvious to plaintiff the moment he climbed upon the car, and, having assumed the risk of icing the car under such conditions, he cannot be heard now to complain"); Illinois Central R.R. Co. v. Nichols, 173 Tenn. 602, 118 S.W.2d 213, 218 (1938) ("And, hence, there is no liability from dangers that *are obvious, or as well known to the person injured as to the owner*") (emphasis in original); Park v. Sinclair Refining Co., 142 S.W.2d 321, 324-25 (Tenn. Ct. App. 1940) (holding no liability is established "when it appears that the injured person's knowledge of the danger surpassed or equaled that of the defendant").

In these cases, I would find the defendants owed a duty to their respective plaintiffs. Once it has been determined that the plaintiffs fall within the foreseeable class of persons, I would require the evaluation of the danger, the reasonableness of the defendants' actions and the reasonableness of the plaintiffs' actions in confronting the danger to be decided by the trier of fact in comparing the fault of the parties. The relevant inquiry is the conduct of each of the parties and whether that conduct falls below the standard of care so as to breach the duty owed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIRECT AND RE-DIRECT EXAMINATION
OF DR. STANLEY RABUN, PLAINTIFF'S EXPERT

Sixth Circuit Case Nº. 96-6405

Pages C-1 thru C-25

admitted. Otherwise, the jury doesn't see them. That is up to you.

MR. LEE: I would, just because there is a lot of paper I would choose not to.

THE COURT: Very well.

MR. HILL: Your Honor, of course, the deposition included on cross-examination -- I do wish for those exhibits that were made a part of the deposition, I wish for those to be admitted.

THE COURT: All right. That is fine. You move them in at the proper time.

MR. LEE: All right.

(The exhibits were marked into the record.)

JOHN STANLEY RABUN

was first, duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. LEE:

Q. Sir, would you introduce yourself to the jury.

A. My name is John Stanley Rabun.

Q. What is your profession?

A. I am a licensed engineer and a licensed architect. I am a professor at the University of Tennessee.

Q. Are you licensed in the state of Tennessee?

A. Yes, I am in both fields.

Q. What is the difference between the field of architecture and the field of engineering?

A. They are compatible fields. They each do their own area of expertise. The architect is the more artsy inclined individual who designs the shapes, size and configuration of the building and generally to simplify it, the engineer does the structural analysis, puts the beams, columns, etcetera together to make the building work.

Q. How would the architect and engineer work together in the design of, for example, a Petro facility?

A. In about the way I described. The architect would probably be involved with the overall site design, the orientation of the building, the design of the building itself, the restaurant, the seating facilities, the kitchen layout, spaces of that sort. The engineer would be involved in a little bit more of the detail such as the foundation work, the building structure, the beams, columns, roof, etcetera.

Q. Okay. If you have any questions about his expertise, I would like to move on to the issue at hand.

THE COURT: Do you want to voir dire?

MR. HILL: I have no questions that would pertain to Mr. Rabun's qualifications as an architectural engineer itself.

THE COURT: Very well.

Q. When we first started working on the case you were Professor Rabun and now you are Dr. Rabun. Explain to the jury briefly.

A. This is true. I have a bachelor's and Masters in both engineering and architectural; licenses in both fields.

I have just spent the last nine years working on a Doctorate in architectural conservation which I passed my two day oral defense in May and tomorrow technically is graduation day, but I am not going to be there.

Q. That was in England?

A. In England.

Q. Now, Professor Rabun, tell us about how you investigated the Petro site and just run through what your opinions were as to the Petro site.

A. Yes. You had requested about the first of the year that I go out and look at the Petro site which I did. I made two trips there. I found the scene of the accident very easily because the hazard in my opinion is a glowing blinking light to me. I found the hazard immediately. I drove directly to it, got out and investigated it. I made some measurements. I counted the parking spaces, I measured the depth of the parking spaces, the depth of the roadway between parking spaces, prepared a sketch, measured the retaining wall, and the height of the retaining wall and located approximately where I considered the region in which Mr. Brient fell and made observations regarding the situation in general.

Q. Have you an opinion, Dr. Rabun, as to whether or not the condition that you saw is just an ordinary hazard?

A. I consider this more than the ordinary. I consider this hazard an extreme hazard by virtue of the fact

that you have got an open parking facility there that public is allowed to park on. There is no warning signs, there is no guardrail to prevent a person from falling over the wall. I would visualize any age bracket of people being there from children on up through elderly people. Children playing in the parking lot, elderly people walking. The lot is illuminated at night. The station is open 24 hours a day. But the hazard is there and it in my opinion, has been for years an accident looking for a place to happen.

Q. Have you an opinion as to whether or not the parking lot at Petro violates any ordinances of Knox County in any regard?

A. Yes, it does.

Q. Okay. Explain to the jury those that it violates, if any.

A. When you construct buildings and facilities within Knox County, Tennessee, you are required to follow two codes. One is the Standard Building Code which is adopted statewide in the state of Tennessee. Also locally adopted by Knox County and locally adopted by the city of Knoxville.

In addition, you have the Life Safety Code which are in the same manner both adopted throughout the state and locally adopted. The reason for the local adoptions is it allows the local government bodies to make amendments to these codes. The state of Tennessee mandates the code statewide. In locales where you don't have building

inspection officials the Code just applies per say. In locales such as Knoxville, Knox County where you have a strong building code and plans review section, they make minor local modifications to the requirements in the Code.

Q. I am looking at, Dr. Rabun, exhibit 17. With the Court's permission, could you come down here and identify this, if you would.

(Exhibit No. 17 was marked for identification.)

A. This is portions of two pages out of the Standard Building Code labeled here which is stamped bottom of the page with the page number, Standard Building Code 1985 which would have been the code in force at the time this facility was built.

Q. Professor Rabun, with this red magic marker would you just underline just the most important parts of the 185 building code that would apply to the Petro premises.

A. Yes. I will have to glance through because it was -- here under Section 412.6.3, "Pedestrian guardrails shall be a provided in accordance with 1112.1 at all exterior and interior vertical openings on all floor and roof areas where automobiles are parked or moved and when the vertical distance to the ground or surface directly below exceeds three feet."

To me is this the pertinent portion of the Code right here, when we have a grade separation more

than three feet. You have the potential for someone falling from the higher level to the lower level, unless there is a guardrail there to prevent the person from falling.

Q. Dr. Rabun, on the top of the exhibit 17 you see "automobile parking structures." It's been said that this Petro premises is not an automobile structure. What is your response to that?

A. The premises in the area that we are looking at where the retaining wall is constructed is an automobile parking structure. The retaining wall itself is a structure. It requires a licensed professional engineer to design the retaining wall. We have two different types of parking facilities. A garage that we all know as a parking garage is a parking structure. A parking lot that has a grade separation by virtue of a retaining wall requires a structural retaining wall and, therefore, it is a parking structure.

Q. How does the Building Code define structure?

A. Structure, I could get the Code and read it to you direct. Structure is anything that is made by man. The relocation of soil, the construction of curbs, the construction of a building, anything that man does is considered structure. Do you want me to read the definition in the Code?

Q. That is okay. Now, this section 1121 titled "guardrails", what, if any, of this section is pertinent to this case?

A. 1121 is referenced in the section I read, but there's a misprint. In Section 412 of the Code guardrail in Section 1121, "all unenclosed floor and roof openings, open and glazed sides of landings and ramps, balconies or porches which are more than 30 inches above grade or a floor below-shall be protected by a guardrail. Guardrails shall form a vertical protective barrier not less than 42 inches high. Open guardrails shall have intermediate rails or an ornamental pattern such that a 6 inch diameter sphere cannot pass through."

That last portion is the protection of children. That 6 inch sphere has now been reduced down to three inches. In the normal size child they cannot get through a rail and fall in spite of the rail if the railing has protective down where a six inch or now a three inch sphere cannot pass. We have the same ruling 30 inches above grade shall be protected by a guardrail.

Q. Before we have you sit down here, can you identify exhibits 52, 46 and 11 as photographs of the Petro facilities?

(Exhibit Nos. 52, 46, 11 were marked for identification.)

A. Yes. This is the Petro facility. The exact place where you were photographed, I stood in that same spot and measured the height of the wall from different locations.

MR. LEE: I offer these exhibits 17, 52, 46 and 11 as exhibits. If you would have a seat.

(Exhibit Nos. 17, 52, 46, 11 were received in evidence.)

Q. Professor Rabun, I also have collective exhibits that are marked as exhibit number 8.

(Exhibit No. 8 was marked for identification.)

A. Yes, sir.

Q. Are these also photos not only of the Petro facilities, but of other examples of retaining walls in the Knoxville area?

A. Yes, they are.

MR. LEE: I would offer exhibit 8 also. I ask the Court, I have some other copies to be shown to the jury while we discuss exhibit number 8.

THE COURT: Very well.

(Exhibit No. 8 was received in evidence.)

Q. Dr. Rabun, in exhibit number 8 I have a photograph with the number 13 on the second page. Is this the area that you have been talking about?

A. Yes, it is.

Q. And flipping on over to picture 15, does this show the height of that curb?

A. Yes, it does.

Q. And what is the height of the curb?

A. The height of the curb, according to the photograph and according to my measurements, is 12 inches above the elevation of the upper parking facility. Photograph number 13 shows you the upper parking facility and the very top of the retaining wall that runs vertically straight down is built of reinforced concrete and it prevents coming over of the ground that it is holding up. Therefore, it's called a retaining wall.

Q. Moving on over to pictures 22 and 23, explain to the jury what those pictures show.

A. Photograph 22 is also from the upper level parking facility and it shows in the background some large trucks that are parked on the lower facility. This is over in the area of the yellow thing you see in both photographs is the wooden stair to allow the truck drivers from parking in the lower facility to walk around to that stair and come up to the upper and go to the restaurant. It's the easiest mode of travel for them. That also, as you can see in photograph number 23, the grade of the retaining wall and the ground below it runs from approximately four feet at one end down to 13 feet something at the other end. Your amount of fall increases as you get along the wall.

Q. Okay. Moving on over to pictures 27, 28, 29, 30. Let me ask you, Dr. Rabun, first what do we see in these pictures?

A. These photographs, as the label says, are at Grady's restaurant out at Kingston Pike and Papermill. We

are looking at a similar parking situation where you have automobiles parked at one level of the parking lot and because of the grade of the site there is a lower level parking and customers can park on either level depending on where they can find a place. What stands out and is very predominant in the photograph here is the retaining wall that they constructed at Grady's comes up 42 inches above the level of the parking lot, therefore, preventing anyone from falling. Even would prevent a car that got loose from actually falling over on top of cars or people that might be below.

Q. What is the significance of the three and a half feet or 42 inches?

A. The 42 inches, of course, is a height in which a normal human, if they fall against it will not fall over. Your center of gravity is slightly lower than that. Some of us that have larger centers of gravity around the waistline is much lower. Therefore, you don't, you are not propelled over the wall. If the wall was lower, say 24 inches or something like that your center of gravity would be higher and you would propel over it. All of these is design things that have come from years and years of testing and experience in the field written by code officials and what we teach in design.

Q. You brought up the Code again. Do you have the 185 Standard Building Code with you?

A. Yes, I do.

Q. Briefly, would you read the first sentence of the preface of that code for us.

A. "This is the preface on III, Standard Building Code 1985. "The purpose of the Standard Building Code is to protect the public's life, health and welfare in the built environment."

Q. Does the Standard Building Code cover every single thing that needs to be done at a building?

A. This is something that is erroneously thought by a lot of lay people and attorneys. The Building Code is not your perfect recipe for building buildings or constructing a issues of safety, issues of It by no means is the exact construction. For instance, mentioned by name in this use for construction it widths. It talks licensed engineer and goes well beyond what facility. It addresses ingress, egress for fire recipe for any and every a Petro facility is not It's a guideline that we talks about ingress, egress about door widths and fire safety, a architect experience, training is in the Building Code.

Q. I am also showing you exhibit 19. You may need with the Court's permission to come down and look at this, if you can't see it.

A. Don't need to. I drew it. I have a version here.

Q. Explain to the jury what we see here in exhibit 19.

A. I may have to come down to do that. Being a professor I have to stand at the blackboard, you know. This is a cross-section that I drew of the retaining wall designed by the engineer that worked on the construction of the facility here. The upper level that I have described using the terminology upper level is the asphalt paving parking lot within 12 inches of the top of the wall. This is the lower level which the measurement I made to the height varies from about four foot at the wooden step to 133 at the extreme end of the wall. This is the position where a guardrail should be applied right here at the top of the wall to prevent a person or even an automobile from going over the wall. 13 feet is a tremendous amount of distance to fall.

Q. Okay. This red drawing on the right corner, what is this?

A. I have not seen this drawing before, but it is a drawing of the same situation labeling the 36 inches which is required in the Standard Building Code and showing a guardrail above the wall at this point. I might also mention that neither the, this drawing or that drawing, this facility did not provide any kind of a fire bump or the typical wheel stop that you typically like to see on a lot of facilities. You know, for various reasons, perhaps we'll never know, but the retaining wall itself is left to act as a wheel stop, and, of course, you are traveling too far and you have jumped that you have done some damage to your

car at minimal or you have gone over or as in the case that we are talking about today if you are walking around your car you could easily fall off of this wall.

Q. Are there any places, and I am pointing to exhibit 52, but any places in this area that warns people not to sleep there on the Petro premises?

A. No, I see no warning signs about the wall or lack of railing or not to sleep or not to park or anything. I think you are invited to park there by the fact that it is a parking facility. It has stripes. It has everything prepared for you to park. Nothing tells you not to get out and go to the back of your car and go to the trunk if you have parked by backing in or go to the front of your car and raise the hood and then turn around and fall off the wall.

MR. LEE: While I am on it, I would like to offer exhibits 19, 17 and 52 and so forth.

(Exhibit Nos. 19, 17, 52 were received in evidence.)

Dr. Rabun, let me also ask you about these red photographs, collective exhibit 9. Have you also looked at those?

A. Yes, sir.

Q. Are these fair and accurate representations of other examples in Knoxville of places that can help the jury understand the Petro facility?

A. Yes, they are.

Q. Okay. I have four copies of this. I would like to ask the jury to share.

Dr. Rabun, if you would, turn to picture 35.

A. Yes.

Q. Now, the Standard Building Code, does it not, well, does the Standard Building Code list any exceptions where guardrails are not required, even though there is a change of elevation of three feet or 30 inches?

A. Yes, it does.

Q. Okay. What does picture 35 show?

A. Picture 35 is at the Tennessee Amphitheater on the World's Fair Site. It is adjacent to the stage area of the amphitheater. The Code makes an exception for performing arts theaters, stages and presidiums where a handrail would obstruct the view of people in the audience from seeing the performers on the stage. To compensate for the fact that that is not protected by a guardrail or handrail the stage is always deeper than it needs to be. If you have ever noticed the performing artists never get out near the edge. Your view is not obstructed by a railing. That is one of the exceptions that logically must be in the Code.

Q. Okay. Let me move on to the yellow group of photographs and ask again if those are fair and accurate representations of places where there may not be that guardrail that we are talking about. The yellow exhibit which is --

A. You said where there may not be. I think it's maybe a little of both, isn't it?

Q. Okay. Let me, in exhibit 40 turn to the Kroger pictures a few pages over. What do you see? Explain to the jury what that area there is.

A. The top photograph or_both photographs are of the facility at Kroger's on Broadway in the Fulton High area. The top photograph is looking toward Broadway. You see the Kroger sign, obviously. Broadway is beyond the edge of this curb. There's a sidewalk. Then there's a retaining wall and I believe First C-reek that drains there in front of Kroger's at that point. The bottom photograph is a photograph of a retaining wall at the opposite end, the back end of Kroger's along the street there that runs east/west that goes from by Fulton High School and on down to St. Mary's Hospital.

Q. And the top photo, is there, should there be a pedestrian guardrail on top of that retaining wall?

A. That retaining wall is adjacent to a sidewalk and there is a bank and then the parking lot and in my opinion there should be a guardrail along that.

Q. Do you know who built that retaining wall?

A. I don't know who the actual designers were. That project was done after the Kroger's was opened when they did the First Creek improvements, and I know the city

is the one that let the contracts for that. Whether they used independent consultants or not, I don't know.

Q. Who designed the retaining wall at the bottom there?

A. That retaining wall is one I designed. That is 20 feet tall. It holds the surcharge of the street and the elevation change there of that street going up toward Fulton high and St. Mary's.

Q. Did you design in this fence?

A. Yes.

Q. Why?

A. Well, it is that much of a grade separation so a barrier of some sort was required and the Kroger people wanted to.'have a chain link fence. We felt that the Fulton High students, while we would hope that they wouldn't decide to take a shortcut across the retaining wall at., the 20 foot high point, there could be a lot of play and rowdiness around that point and then maybe they would come down to a lower spot and jump over the wall. Kroger's wanted to prevent any accidents or any broken bones from happening on their premises.

Q. Okay. Turning over to these pictures here, you see what I am looking at?

A. Yes.

Q. Explain what we are looking at here.

A. We are looking at a retaining wall again, the upper right-hand you can see where an automobile is

parked. The person opens the door and is just immediately adjacent to the hazard of falling off. The PVC pipe that you see sticking out of the wall were placed there during the portion of the wet cement and they were places where a railing was supposed to have been provided. It's one of the standard ways that you get a railing into, if you don't support the railing and cast it directly into the concrete you can make a place where the railing can be set down in the dry concrete. For what reason it has never been done, I do not know.

Q. In your opinion, does this condition, as it exists here, is that a hazard?

A. Yes, it is.

Q. Is it a Code violation?

A. Yes, it is.

Q. Does the fact, do you know where this is?

A. No, I don't know the exact location.

Q. Does the fact that this exists in Knox County, I assume it's in Knox County, relieve Petro of its obligation to have a guardrail?

MR. HILL: Your Honor, I object to that. It's not permissible.

THE COURT: He asked according to the Building Code.

Q. Does the Standard Building Code state, how does the Standard Building Code and what we see here in

this picture, what does it say about this condition? Is this a Code violation?

A. This a Code violation in that I can see obviously an elevation change here of more than 36 inches.

Q. Okay. Now, the next page, which I believe is the last page or next to last is, it says "outpatient parking entrance" there?

A. Yes.

Q. Is this a parking garage or parking structure?

A. This is a parking garage.

Q. Okay. How is this different from the Petro facility parking lot where Mr. Brient fell?

A. This is a parking garage which may have ground level parking and three, four, five levels of parking in a building above it. The same requirements apply for this and a parking structure that is on grade that has a retaining wall separating two levels. Anytime you have a grade change or an opportunity to fall more than 36 inches, and some people even feel like that is excessive, specially where old people are involved and what have you, a guardrail of some sort to prevent that fall must be provided and in the instance of a building such as this it's fairly easy to do in that you can incorporate a part of the structure as the rail.

Q. Have you an opinion, Professor Rabun, whether the lack of a pedestrian guardrail was the proximate cause of Mr. Brient's broken femur?

MR. HILL: Your Honor, I object. That is not for this witness to decide a proximate cause issue.

THE COURT: Sustained.

Q. Dr. Rabun, was it feasible to have a guardrail?

A. During the construction of the Petro site it would have been a very simple matter and relatively inexpensive matter to protect the top of that wall with a guardrail along its entire length.

Q. And is it feasible today to construct a pedestrian guardrail and retrofit that parking lot?

A. Yes, it is.

Q. And before I turn you over to Mr. Hill, does, it was said that the Code applies to buildings only. What is your response to that?

A. Where safety is concerned and grade changes and a structural element such as a retaining wall is utilized to make a grade change, the Code applies in my professional opinion specifically to that point, Life Safety Code applies to sidewalks, streets, anything beyond the building. Life Safety Code has the exact same requirements as the Standard Building Code with one exception. The Life Safety Code says you cannot have more than 30 inches of grade change without having a guardrail.

Q. On exhibit 17, which is the Standard Building Code, what are these provisions intended to prevent?

A. These provisions are intended to prevent the user, the consumer, the public, if you will, who visits a commercial facility from being injured by a hazard that has not been adequately protected.

MR. LEE: That is all of the questions. Thank you.

THE COURT: You may ask.

MR. HILL: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HILL:

Q. Dr. Rabun, you are a full-time professor, aren't you?

A. Yes, I am.

Q. You don't really do too much or anything any more as far as actually engineering and architectural. Your basic job now is pretty much full-time professor, is that fair to say?

A. Well, I have reached an age and an involvement at the University where I have less time for outside practice than I did at an earlier age. Less energy as well. I do maintain licenses. I maintain the competency by both giving and taking CEUS, going to seminars and what have you. As far as the state of Tennessee and ten other states are concerned, I am legally fit to practice.

Q. You are still licensed?

A. Yes, sir.

Q. But full-time what you do is a professor?

A. Full-time I try to help others prevent problems of this sort.

Q. Full-time professor?

A. Yes.

Q. Yes.

Q. In addition to that, You get involved in a

A. Yes, that is true.

MR. HILL: That is all I have.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. LEE:

Q. Dr. Rabun, on the concentrate fully, in your opinion is it foreseeable that people will not concentrate fully?

MR. HILL: Your Honor, I don't think he can say what is foreseeable, the people at large everywhere are going to do.

THE COURT: Rephrase your question, please, based upon his expertise.

Q. Dr. Rabun, is it foreseeable that people will fall at a place that has more than a 30 inch or 36 inch vertical drop in which there is not a 42 inch pedestrian guardrail?

MR. HILL: Object. That is outside the field of this man's expertise.

THE COURT: Overruled. You may ask him.

A. Yes, it's not only foreseeable. It's predictable that at some point in time someone will fall. One of the Code mandates is when we design stairs, fire stairs within a dwelling or a building that every riser be of equal height. We have to calculate the floor to floor separation and calculate every riser to the same height. If you go in and construct the stairs in an unorganized manner and one riser is an inch and a half or some degree different from the other people will fall from the riser. We have all experienced the fact that when you are coming downstairs your mind leaves the fact you are going downstairs. It's an automatic motion with us. Our computer knows exactly where the next step is. We have all experienced at the top or the bottom of the stair you expect one more and do that unorthodox step that almost you fall down. The same thing applies to a case such as Mr. Brient's case here. He went to the back of his truck to get something out to do some arranging with the tools or whatever he had in the rear of this truck. He had to open the tailgate to step back to open the tailgate. We have all done that. You have to open the camper top. You step back to do that. I contend his mind was not on the hazard at that point.

MR. HILL: He is totally speculating now about what happened. He has already said he doesn't know What happened. Now he is giving the jury an explanation-of what happened out there. That is not responsive to the question.

THE COURT: Rephrase your question.

Q. Let me move on and show you exhibit 60, that is the Petro stopping center, the three pages Mr. Hill has given me today. First, can you identify what has been marked as exhibit 60?

A. Yes. These are a portion of the, what we call construction drawings for this project. Three drawings here pertaining mainly to the site layout, the drain arc, retention basin, the location of the paving, the retaining wall design drawings specifying the reinforcing bar and the type of concrete and then what appears to be a cover sheet showing the location of the facility in reference to Knoxville and the interstates.

Q. Now, is that, those three pages the only three pages that the Code inspector or plan's examiner would look at when he approved this project?

A. No. There would probably be approximately 40 or 50 drawings of this. These are reduced about five times. The drawings would be the-standard architectural type drawings. Anywhere from 40 to 50 drawings probably involved in this including the structural, mechanical, electrical the architectural building itself; the site improvements the ones we have including the retaining wall. A numoer -- going to another department -- the electrical, the plumbing is a department, general building is a department.

Q. Let me ask you if on the third page you see any drawings on the third page of exhibit 60 that designed or created any stairs like what we see on exhibit 26.

A. No. There is nothing on the drawings that you have given me that show that there is a stair to be located in that spot or the details of the construction of the stair. I might add that that stair is wooden, adequate, but deteriorating with time, a little rickety. Obviously something that was added after the construction was finished.

Q. The Code inspector, does that person have the power to issue today a citation against any Code violation once a project is finished?

A. The building inspector, the Plans Review Department once a certificate of occupancy is issued, unless there is a storm, a major disaster, a car blows through the building or something of that sort has no jurisdiction over the project. The fire Marshal has jurisdiction every day of every year.

Q. Okay. You were asked about another case, the only other case that you and I are involved?

A. Yes.

Q. Do you recall that case off hand?

A. Yes.

Q. Okay. Explain to the jury what happened in that case just briefly because it's already been brought up and I think it's relevant.

MR. HILL: This has no relevance at all in issues in this lawsuit.

THE COURT: Sustained.

Q. Now, you were hired by the plaintiffs, were you not?

A. That is correct.

Q. Okay. And have you not in a sense advised then to put in a pedestrian guardrail?

MR. HILL: Your Honor, I object.

MR. LEE: That is all of the questions I have. I don't want to beat a dead horse.

RECROSS-EXAMINATION

BY MR. HILL:

Q. Doctor shown here, those have nothing at all to do with the issues in this case, do they?

A. No, they do not.

MR. HILL: That is all.

THE COURT: Thank you. You may be excused. You may stay, if you wish.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EXCERPTS FROM TRIAL TESTIMONY
OF MICHAEL WALLER, DEFENDANT'S EXPERT

Sixth Circuit Case Nº. 96-6405

Pages D-1 thru D-3

Q. Okay. When you did your work for the Petro's lawyer did you know that boys pass footballs up on that area up there?

A. No, sir.

Q. Did you know that campers are up there almost every night?

A. No, sir.

Q. Did you know that from somewhere to 100 to, I am sorry, from 150 to 175 people sleep on the general Petro premises every single night?

A. No, sir.

Q. Would you let your son play or pass football up on this upper parking lot up here?

MR. HILL: That sounds argumentative. It's not relevant.

MR. LEE: I withdraw the question.

Q. So, still forgetting about whether there is a code violation you believe this is a hazard, do you not?

A. Yes, sir.

Q. Okay. Let me ask you about the Code.

THE COURT: Let's get one thing clear, counsel. When he says this, what is he talking about?

MR. LEE: Okay. Mr. Waller, when you said this and I was asking you about what we see here in exhibit 52 --

A. Yes, sir.

Q. -- are you referring to this parking lot we see here?

A. Yes, sir.

Q. Okay. Let's talk about the 1985 Southern Building Code, Standard Building Code. You have a copy there in front of you?

A. Yes, sir.

Q. In Chapter two, I believe does that not give definitions that apply to the Code?

A. Yes, sir.

Q. Okay. How does the Code define the word "structure"?

A. That which is built or constructed. Something along that line.

Q. Okay. Was this area here that we see in 52, was this retaining wall built or constructed?

A. Yes, sir.

Q. Okay. This is a copy of exhibit 17. Now, Mr. Waller, do you see that section 412.6.3?

A. Yes, sir.

Q. Okay. You see that last sentence in that section?

A. Yes, sir.

A. Generally, yes, sir. There is usually a certificate of occupancy or some kind of final inspection performed on the project.

Q. Let's cover that. That is kind of a step I didn't bring out with you. Tell us something about what goes on in terms of the plan approval process?

A. Basically you take a set of plans that you have drawn. You can submit them in stages. Most building officials like you to submit your building plans along with your site plans. You can submit the site plans and get a grading permit first and start work while you are waiting on your building plans. Most of them like for a complete set of plans to be submitted to the building official for his review. He basically reviews them, makes any comments and any corrections that he wants made and then you resubmit them and a building permit is issued.

CROSS-EXAMINATION

BY MR. LEE:

Q. Now, look at exhibit 52, Mr. Waller. You believe that is a hazard, don't you?

A. Yes, sir.

Q. And you have got a son, that is one son, right?

A. Two now.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER DENYING
PETITION FOR REHEARING EN BANC

Sixth Circuit Case Nº. 96-6405
Filed March 5, 1998

96-6405/6494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT H. BRIENT, JR.,	)	
	)	
Appellant/Cross-Appelle,	)	
	)	
v.	)	ORDER
	)	
PETRO PSC, L.P, A DELAWARE LIMITED PARTNERSHIP,	)	
	)	
	)	
Appellee/Cross-Appellant.	)	
	)	
	)	

BEFORE: BOGGS, MOORE, and FARRIS,* Circuit Judges

The court having received a petition for rehearing en banch, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggesting for rehearing en

---

*Hon. Jerome Farris, United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

banch, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accodingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk
Leonard Green, Clerk

Supreme Court, U.S.
FILED
JUN 25 1998
OFFICE OF THE CLERK

No. 97-1934

In The

Supreme Court of the United States

October Term, 1997

ROBERT H. BRIENT, JR.,

Petitioner,

v.

PETRO PSC, LP, a Delaware Limited Partnership,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD T. HILL
Counsel of Record for Respondent
SPICER, FLYNN & RUDSTROM, PLLC
800 S. Gay Street, Suite 1209
Knoxville, Tennessee 37929
423-673-8516

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 pp

QUESTION PRESENTED

Whether the decision of the Court of Appeals is consistent with Tennessee law on the issue of duty being a required element in a premises liability action?

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STATEMENT OF THE CASE

Petitioner's statement of the case sets out an incomplete and out-of-context view of the facts relied upon by the Court of Appeals in deciding this case. As noted several times in the opinion of the Court of Appeals, the court was particularly persuaded by the undisputed fact that Mr. Brient had full knowledge and awareness of the condition at issue in this case. The condition at issue was a two level parking lot separated by a retaining wall. It was undisputed that the area was well lighted. It was also undisputed that Mr. Brient was aware of the two levels of the parking lot as well as the retaining wall.

Furthermore, the petition states at page four that the jury verdict was "lower than the stipulated medical damages alone." To the contrary, there was a very sharp dispute about damages allegedly sustained by Mr. Brient. One of the petitioner's doctors testified that Mr. Brient did not need certain therapy requested by Mr. Brient himself. Also, contrary to Mr. Brient's testimony that he was so disabled he could not even tie his own shoes, opposing testimony by a private investigator apparently convinced the jury that Mr. Brient's damages were much less than he claimed.

At page four of the petition Mr. Brient states that the Court of Appeals held that "Mr. Brient was not entitled to a jury trial." Obviously, Mr. Brient received a jury trial. The Court of Appeals held that Petro was entitled to judgment as a matter of law because Mr. Brient did not establish the duty element of negligence.

At page five of the petition Mr. Brient notes that he filed a second motion to reconsider the decision of the

Court of Appeals after the *Coln v. City of Savannah* case was decided by the Tennessee Supreme Court. (The *Coln* decision contained as Appendix B in the petition is the sole authority relied upon by Mr. Brient in his petition.) At the time Mr. Brient's petition was submitted to this Court such second motion to reconsider was still pending before the Court of Appeals. On June 1, 1998, the Court of Appeals denied Mr. Brient's second motion to reconsider based upon the *Coln* case. Such order is included as Appendix A with this brief of Petro in opposition.

REASONS FOR DENYING THE WRIT

There are no compelling reasons for a grant of a writ of certiorari in this case. None of the reasons cited in Supreme Court Rule 10, indicating the character of the reasons the Court considers, is present in this case. The petitioner contends that the Court of Appeals has decided this case in conflict with a decision of the Tennessee Supreme Court. That is not even one of the reasons cited in Supreme Court Rule 10 since this matter does not involve a federal question. Even more importantly, the decision of the Court of Appeals is not in conflict with a decision of the Tennessee Supreme Court as contended by petitioner.

Mr. Brient's petition revolves simply around his contention that the decision of the Court of Appeals is in conflict with the decision of the Tennessee Supreme Court in the case of *Coln v. City of Savannah*. (Copy of *Coln* opinion included in Appendix to Mr. Brient's petition.)

However, analysis of the opinion in *Brient* and the opinion in *Coln* shows that the two cases are not in conflict.

In *Brient* the Court of Appeals held that Mr. Brient could not establish the duty element of negligence. (See opinion of Court of Appeals in *Brient*, reprinted at page A-10 of the Appendix to petition.) The Tennessee Supreme Court in *Coln* emphasizes that duty is still an essential element which must be established by a plaintiff in a premises liability action.

Perhaps the clearest way to see that the *Brient* opinion does not conflict with the *Coln* opinion is to look at an earlier Tennessee Supreme Court case which was heavily relied upon in the *Brient* opinion and cited with approval in the *Coln* opinion. That case is *Eaton v. McClain*, 891 S.W.2d 587 (Tenn. 1994). In *Eaton* the Tennessee Supreme Court held that the plaintiff failed to establish the required duty element of a negligence case. Therefore, the Tennessee Supreme Court held that the defendant was entitled to a directed verdict in *Eaton*. In *Coln* the Tennessee Supreme Court specifically stated that its analysis in that case was consistent with *Eaton*. (See *Coln*, reprinted beginning at B-1 in Appendix to petition, at B-24.)

Another way to demonstrate that the *Brient* opinion is not in conflict with the *Coln* opinion is in the recognition that the Court of Appeals in no way relied upon the opinion of the Tennessee Court of Appeals in the *Coln* case. Had the Court of Appeals relied upon the erroneous ruling of the lower court in *Coln*, only then might it be said that the *Brient* opinion would be in conflict with the Tennessee Supreme Court opinion in *Coln*. To the contrary, the ultimate judgment in the *Brient* case is wholly

consistent with the Tennessee Supreme Court cases of *Coln v. City of Savannah* and *Eaton v. McClain*.

As pointed out at page five of Mr. Brient's petition, Mr. Brient filed a second motion to reconsider this case in light of the *Coln* opinion. The Court of Appeals presumably agrees that its judgment in *Brient* is correct and is consistent with *Coln* since the court denied Mr. Brient's second motion.

CONCLUSION

For the reasons set forth above, the writ should be denied. Furthermore, the alternative relief sought by petitioner, that the case be remanded to the Court of Appeals, should be denied.

Respectfully submitted,

RONALD T. HILL
Counsel of Record for Respondent
SPICER, FLYNN & RUDSTROM, PLLC
800 South Gay Street, Suite 1209
Knoxville, Tennessee 37929
423-673-8516

APPENDIX

Case No: 96-6405: 96-6494

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

(Filed Jun. 1, 1998)

ROBERT H. BRIENT, JR.

Plaintiff-Appellant Cross-Appellee

v.

PETRO PSC, LP, a Delaware Limited Partnership

Defendant-Appellee Cross-Appellant

BEFORE: BOGGS, MOORE, AND FARRIS,* Circuit Judges.

Upon consideration of the appellant cross-appellee's motion to suspend rules and allow petition for rehearing, and for en banc consideration under extraordinary circumstances,

And further considering the appellee cross-appellant's response in opposition,

It is ORDERED that the motion be and it hereby is **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk